

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
January 14.

RAICHAND MOTICHAND (ORIGINAL PLAINTIFF), APPLICANT, v.
NARAN BHIKHA (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), section 257-A—Evidence Act (I of 1872), section 92—Execution of decree—Agreement—Khata—Decision on a point not raised by the defendant.

It is not open to a Judge to decide a case in defendant's favour on a point not raised by him with the result that if the decision be upheld it will cast upon the defendant a far higher liability than if he had made the order which the plaintiff had asked for.

In an execution proceeding the parties arrived at an agreement in satisfaction of the decree. The agreement was in the form of a *khata*. Subsequently the plaintiff brought a suit on the *khata* and claimed interest on the amount in suit. A question having arisen in the suit as to whether the *khata* sued on was enforceable,

Held, allowing the claim for the principal amount only, that if there was an agreement to pay interest then either it was a part of the agreement embodied in the *khata*, or was a separable agreement. If it was a part of the agreement to be embodied in the *khata*, then under section 92 of the Evidence Act (I of 1872), evidence of it was not admissible. If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata*, which, apart from the separate oral agreement, could not be open to objection under section 257-A of the Civil Procedure Code (Act XIV of 1882).

Bhagchand v. Badhakisan⁽¹⁾ followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Mohanrai D., Subordinate Judge of Bulsar, in the Surat District, in Small Cause Suit No. 1338 of 1902.

The plaintiff sued in the Court of the Subordinate Judge of Bulsar in his Small Cause Jurisdiction to recover Rs. 102-8-0 due on a *khata* dated the 25th October, 1902. The *khata* was for Rs. 101 and Rs. 1-8-0 were claimed for interest. The *khata* was passed by the defendant in satisfaction of a decree in execution proceedings and it ran as follows :—

* Application No. 207 of 1903 under the extraordinary jurisdiction.

(1) (1903) 28 Bom. 62; 5 Bom. L. R. 672.

The account of Kanbi Naran Bhikha of the village of Kalwada (opened) on the 9th day of Aso Vad of the (Samvat) year 1958 (25th October, 1902).

Cr. _____ Rs. a. p. Dr. _____ Rs. a. p.

On the 9th day of Aso Vad (25th October, 1902) a decree (bearing) number 784 of 1898 was passed in your favour against my deceased father Bhikha Gowan, for (execution of) which Darkhast number 779 was preferred. Having this day given a kabulat in respect of the same for Rs. 101, I have written and passed this *khata* in my name. Therefore this day the above-mentioned sum of Rs. 101, namely, one hundred and one, has become payable by me to you. By (my) own hands (this *khata* is opened). The handwriting of Dayabhai Nanabhai; (written) at the request of the party.

101 0 0

Naran Bhikha; my signature; (my) own handwriting. I agree (to pay) the abovementioned sum of rupees one hundred and one. My own handwriting.

101 0 0

The defendant admitted the *khata* as well as the claim.

At the hearing the Subordinate Judge raised an issue:—Is the document in suit enforceable at law? He found on the issue in the negative and dismissed the suit on the following grounds:—

Turning then to the merits it is scarcely necessary to point out that the present case is governed by the 2nd clause and not the 1st of section 257-A., Civil Procedure Code, and that neither the Bombay nor the Madras decision quoted for the plaintiff (25 Bombay 252; 26 Madras 19) can thus come into play in the present instance.

In these circumstances the interest not allowed by the decree being on plaintiff's own admission chargeable at 9 per cent. per annum according to their then agreement—*vide* Exhibit 23,—*cf.* defendant's admission of this claim with interest as preferred in Exhibit 5. I feel that the case is clearly within the spirit of section 257-A., clause 2, Civil Procedure Code, and that the necessary sanction having in consequence been previously refused in the matter, *vide* Exhibit 24, the present claim based on any such *khata* is doubtless not at all sustainable at law: (*cf.* 27 Bombay 96). It has been said that Exhibit 19, the document in suit, does not expressly provide for interest in writing, but then it is enough to note that it is never usual to do so in cases of bare

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*khata*s of the kind originally written out as such and that the claim about interest in the plaint taken with the plaintiff's prior statement, Exhibit 23, and defendant's present admission, Exhibit 5, about the same is, in my opinion, sufficient to bring the case within the purview of the clause aforesaid—the attempt on the part of the plaintiff since to withdraw from that portion of the claim or to contradict his own previous admission apart from the permissibility of the cause not evidently helping him in the direction indicated, not to say of Exhibit 17 rendering the agreement void under section 257-A., clause 1, Civil Procedure Code.

The plaintiff preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Judge acted contrary to law in applying the provisions of section 257-A. of the Civil Procedure Code and in holding that the *khata* in suit was not enforceable at law; that the Judge should have held that the *khata* in suit was passed in satisfaction of the decree and did not contravene the provisions of section 257-A., clause 2; that the Judge erred in rejecting the plaintiff's claim in face of the defendant's admission of the *khata* and the claim; that as the Court struck off the execution-proceeding on the statement of the parties that the decree was satisfied, it should have been held that the Court's order amounted to sanction and any order in the subsequent proceeding did not affect the plaintiff's right under the *khata*; and that the Judge should have held that the alleged stipulation to pay interest was a separable agreement which did not invalidate the claim *in toto*. A *rule nisi* having been issued calling on the defendant to show cause why the decision of the Subordinate Judge should not be set aside,

N. V. Gokhale appeared for the applicant (plaintiff) in support of the rule:—The *khata* contains no stipulation for the payment of interest. It does not extend the time for the execution of the decree, nor does it provide for the payment of a sum in excess of the decretal amount. On the contrary it provides for the payment of a smaller sum. Thus the provisions of section 257-A. of the Civil Procedure Code are not applicable. We had claimed interest in the plaint according to the usual mercantile custom and not on account of any agreement to pay it. Further we had even applied to the Court relinquishing the claim for interest. Supposing that there was an oral agreement

to charge interest, that part of the agreement is severable from the written *khata* and may be held to be void, but the *khata* itself which does not provide for interest is, we submit, enforceable. The ruling in *Bhagchand v. Radhakisan*⁽¹⁾ is on all fours.

N. K. Desai appeared for the opponent (defendant) to show cause:—The plaintiff admitted in Exhibit 23 that there was an oral agreement to charge interest though he afterwards tried to relinquish his claim for it. The agreement to pay interest would make the amount to be paid under the *khata* greater than the decretal amount. The provisions of section 257-A. of the Civil Procedure Code are, therefore, applicable.

The agreement to pay interest, though oral, cannot be separated from the *khata* as it was intended to run from the date of and simultaneously with the *khata*.

The object of section 257-A of the Civil Procedure Code is to prevent a judgment-creditor from taking any undue advantage over the judgment-debtor and to prevent multiplicity of suits. This object of the section will be frustrated if parties be allowed to intermeddle with the decree of the Court without its sanction and the same subject-matter be allowed to be brought before the Court in different proceedings in different forms: *Heera Nema v. Pestonji*⁽²⁾.

JENKINS, C. J.:—The Judge on a point not raised by the defendant has decided this case in the defendant's favour with the result that, if his decision is upheld, it will cast upon the defendant a far larger pecuniary liability than if he had made the order which in these proceedings the plaintiff asks for. We think, however, we can release the defendant from the position in which he has thus been placed.

If there was an agreement to pay interest (which we very much doubt) then it either was a part of the agreement embodied in the *khata*, or it was a separate agreement. If it was a part of the agreement to be embodied in the *khata*, then under section 92 of the Evidence Act, evidence of it was not admissible. If it was a separate agreement, then on the authority of *Bhagchand v. Radhakisan*,⁽¹⁾ it would not vitiate the agreement embodied in

(1) (1903) 23 Bom. 62; 5 Bom. L. R. 672. (2) (1898) 22 Bom. 693.

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the *khata*, which apart from this supposed oral agreement would not be open to objection under section 257-A of the Civil Procedure Code.

We, therefore, make the rule absolute and pass a decree in the plaintiff's favour for Rs. 101. The plaintiff to get the costs of the Court below but not the costs in this Court.

Rule made absolute.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.O.I.E., Chief Justice, and Mr. Justice Aston.

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January 12.

SHIVABHAJAN DURGAPRASAD (ORIGINAL PLAINTIFF), APPELLANT, v. SECRETARY OF STATE FOR INDIA: (ORIGINAL DEFENDANT 2), RESPONDENT.*

Statute 21 and 22 Vict., c. 106, sections 41, 42 and 65—Secretary of State in Council—Negligence of Chief Constable—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Construction.

In a suit instituted against the Secretary of State in Council to recover damages on account of the negligence of a Chief Constable with respect to goods seized, it was contended that the liability of the Secretary of State in Council is to be determined with reference to what would have been the liability of the East India Company, were it still in existence,

Held, that the suit was not, maintainable inasmuch as the Chief Constable seized the goods not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature, for the appointment of the Chief Constable was not made by the Bombay Government, but by an officer clothed by the Legislature with power in that behalf; the seizure of the goods was not in any sense productive of benefit to the Revenues of the Bombay Government, nor was it a transaction out of which profit could be derived and there had been no ratification or adoption of the act.

The term "Government of India" in section 42 of the Statute points to its bearing the meaning, not of the Governor General in Council, but of the superintendence, direction and control of the country.

The words of sections 42 and 65 are capable of the construction that the reference in them to the East India Company is in case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which the liability may be enforced, and not the circumstances under which it may be incurred.

* Appeal No. 6 of 1903.